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**IN THE
COURT OF APPEALS OF INDIANA**

RONNIE C. SMITH,)
)
 Appellant-Defendant,)
)
 vs.) No. 15A01-0707-CR-336
)
 STATE OF INDIANA,)
)
 Appellee-Plaintiff.)

APPEAL FROM THE DEARBORN CIRCUIT COURT
The Honorable James Humphrey, Judge
Cause No. 15C01-0611-FB-44

April 14, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Ronnie C. Smith appeals his conviction for Conspiracy to Manufacture Methamphetamine,¹ a class B felony, challenging the sufficiency of the evidence. Smith also claims that his conviction must be reversed because the prosecutor committed misconduct, that the trial court improperly admitted evidence that was seized from a residence, and that the twenty-year sentence imposed was inappropriate in light of the nature of the offense and his character. Finding no error, we affirm the judgment of the trial court.

FACTS

Smith, Robert Gregory, and Justin Callaway were all employed at the same company in Dearborn County. Callaway was a methamphetamine addict, and Gregory knew how to manufacture the drug. At some point, the three men agreed to manufacture methamphetamine. Callaway agreed to provide the location for the production at his mother's house in Dearborn County, where he also resided, in return for a portion of the finished product.

On November 17, 2007, Gregory purchased some Energizer batteries and paper towels from a local grocery store. That type of battery is a common source of lithium, which is a necessary ingredient in the methamphetamine manufacturing process.

On November 18, 2007, Callaway returned home to find Gregory and Smith at the residence. Gregory parked his truck inside Callaway's barn and they all began to unload items from the truck including a propane tank with an altered valve, a drain clog remover,

¹ Ind. Code § 35-48-4-1.1(a)(1)(a); Ind. Code § 35-41-2-4.

two bags of ammonium nitrate fertilizer, Coleman camp fuel, and some pills. At some point, Gregory directed Callaway to boil some water and put it in a cooler in the barn. Gregory used an orange funnel to pour the ammonium nitrate fertilizer into the propane tank, and Smith handed Gregory some lye to pour into the funnel. The combination of ammonium nitrate with drain clog remover and water creates anhydrous ammonia, which is a necessary precursor used to manufacture methamphetamine.

That same day, a confidential informant told police officers that Gregory was cooking a batch of methamphetamine in a barn on Callaway's property. As a result, several police officers began performing surveillance on the property around 3:30 p.m. Thereafter, at approximately 6:30 p.m., several officers approached the residence and requested to speak to Callaway about an unrelated battery incident that they were investigating. Callaway allowed the officers inside, and they noticed Gregory seated on the couch in the living room. Gregory told the officers that he had parked his truck in Callaway's barn. Unbeknownst to the officers at that time, Smith and a female were in a back bedroom.

While speaking with Callaway, one of the officers noticed several paper towels in Callaway's pocket. When the officers asked Callaway to empty his pockets, they noticed some white residue on one of the paper towels. The officers took the paper towel and performed a field test on it. The paper towel tested positive for methamphetamine. The officers also noticed a soup pot on the stove that contained a large amount of white powder residue.

Thereafter, Detective Shane McHenry left the premises and obtained a search warrant for the residence and barn. Detective McHenry subsequently returned, and the officers executed the warrant at approximately 10:20 p.m. During the search, the police officers found Smith in one of the back bedrooms.

While searching the barn and the surrounding property, the police recovered two fifty-pound bags of ammonium nitrate, two bottles of drain clog remover, a bottle of Liquid Fire, two containers of camp fuel, an empty blister pack of pseudoephedrine pills, and several other items that are used in the production of methamphetamine. A substance found in a bucket tested positive for methamphetamine and pseudoephedrine, and a quantity of anhydrous ammonia was also found.

Thereafter, Smith was charged with manufacturing methamphetamine and conspiracy to manufacture. Prior to trial, Smith filed a motion to suppress, alleging that all of the evidence that was seized during the search had to be suppressed because the search was allegedly conducted before the warrant had been obtained. Indeed, while the warrant indicated that it had been signed at 10:53 p.m., the return on the warrant indicated that it was executed at 10:15 p.m.

During the suppression hearing, Detective McHenry testified that there must have been a typographical error because he was “certain” that the warrant was not executed until after it had been issued and that the search did not begin until the owner of the property had been personally served with the warrant. Tr. p. 55-56. The trial court denied Smith’s motion to suppress.

At some point during the jury trial that commenced on May 9, 2007, Smith renewed his motion to suppress. Detective Nicholas Beetz testified that Detective McHenry returned to Callaway's residence with the warrant shortly after 10:00 p.m, that the search commenced, and that Smith was discovered in the bedroom moments after the search began. Officer Brian Fields also testified that the search did not begin until after Detective McHenry returned with the warrant. The trial court denied Smith's renewed motion to suppress, finding, among other things, that Smith lacked standing to challenge the search of Callaway's property.

During voir dire, the prosecutor read a poem entitled "My Name is Meth" and asked the prospective jurors to respond to it in the context of asking questions about their views regarding methamphetamine and illegal drugs in general, laws making certain drugs illegal, and whether they thought that drug crimes were victimless crimes. Smith objected to the reading of the poem on the grounds that it emphasized the "badness" of methamphetamine compared to other crimes and that the prosecutor was attempting to inflame the passions of the jurors. Tr. p. 90, 92. The trial court overruled Smith's objection.

During the course of the trial, several witnesses testified without objection that the chemicals used in the methamphetamine manufacturing process are explosive and dangerous. One police officer testified without objection that methamphetamine is highly addictive and a growing problem in Indiana and around the country. However, Smith objected to the State Police chemist's testimony as to the effects of methamphetamine on

individuals, claiming that the testimony was not relevant and was intended to prejudice the jury.

At some point during the prosecutor's opening statement, Smith objected when the prosecutor referenced a methamphetamine "epidemic" and the dangers associated with the manufacture of that drug. Id. at 314-15. During closing argument, the prosecutor—without objection—briefly discussed the dangers associated with the production and use of methamphetamine.

Following the presentation of the evidence, the jury found Smith guilty of the conspiracy charge but not guilty on the manufacturing count. At the sentencing hearing that was conducted on June 14, 2007, the trial court identified Smith's criminal history, which included a prior conviction for cocaine dealing in 1989, as an aggravating factor. While the trial court considered Smith's argument that incarceration would pose a hardship on his family, it declined to find it a significant mitigator because Smith's children were already adults who had grown up without him because of his prior incarceration. The trial court sentenced Smith to twenty years of incarceration and he now appeals.

DISCUSSION AND DECISION

I. Admissible Evidence

Smith argues that the evidence seized from Callaway's residence and barn should not have been admitted at trial because the search "warrant and return times are in discrepancy indicating that the evidence was seized before the warrant was properly

procured.” Appellant’s Br. p. 5. As a result, Smith maintains that his conviction must be reversed.

In resolving this issue, we initially observe that a trial court has broad discretion in ruling on the admissibility of evidence. Washington v. State, 784 N.E.2d 584, 587 (Ind. Ct. App. 2003). We will reverse a trial court’s ruling on the admissibility of evidence only when it constitutes an abuse of discretion. Id. An abuse of discretion involves a decision that is clearly against the logic and effect of the facts and circumstances before the court. Id.

The rights guaranteed under the Fourth Amendment to the United States Constitution are personal and may not be vicariously asserted. Polk v. State, 822 N.E.2d 239, 245 (Ind. Ct. App. 2005). To challenge the validity of a search, an individual must have “a legitimate expectation of privacy in that which is searched,” meaning that the person must have control or ownership of the premises. Peterson v. State, 674 N.E.2d 528, 532 (Ind. 1996). Indeed, “a defendant aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by the search of a third person’s premises has not had any of his Fourth Amendment rights infringed.” Sisk v. State, 785 N.E.2d 271, 274 (Ind. Ct. App. 2003).

We also note that Indiana law imposes a requirement of standing to challenge a search or seizure. Mays v. State, 719 N.E.2d 1263, 1267 (Ind. Ct. App. 1999). To challenge evidence as the result of an unreasonable search or seizure under Article 1, Section 11 of the Indiana Constitution, a defendant must establish ownership, control, possession, or interest in either the premises searched or the property seized. Peterson,

674 N.E.2d at 534. The burden is on the defendant to show a legitimate expectation of privacy in the premises searched or the property seized. Lander v. State, 762 N.E.2d 1208, 1211 (Ind. 2002).

In this case, the trial court observed that Smith had no standing to challenge the search. Indeed, the evidence established that Callaway's mother owned the premises that were searched. Tr. p. 575-76. Smith failed to show that he had any connection to the property, much less that he owned it or had a possessory interest in it. As a result, there is no basis upon which Smith could be found to have standing to challenge the validity of the search of Callaway's property. Hence, the evidence seized from Callaway's premises was properly admitted into evidence.

Even assuming that Smith had standing to challenge the search, his sole argument is that the evidence should have been suppressed because of the time discrepancies in the warrant. As discussed above, Detective McHenry testified that he was "certain" that the search did not begin until after the warrant had been issued. Tr. p. 55. Moreover, Detective McHenry acknowledged that he personally served the owner with the search warrant, and he did not observe that any evidence had been gathered on the premises when he returned with the warrant. Id. Therefore, notwithstanding Smith's claim, it was for the trier of fact to weigh the evidence and decide who and what to believe. Cohen v. State, 714 N.E.2d 1168, 1179 (Ind. Ct. App. 1999). Here, it is apparent that the trial court believed Detective McHenry, inasmuch as it determined that the time discrepancies contained in the warrant amounted to a mere typographical error. Id. at 55-56. Moreover, Detective McHenry's testimony was corroborated by the testimony of Police

Officer Brian Fields, who testified that the search did not begin until Detective McHenry had returned with the warrant. Id. at 737-38. As a result, we decline to disturb the trial court's denial of Smith's motion to suppress.

II. Prosecutorial Misconduct

Smith maintains that his conviction must be reversed because of prosecutorial misconduct. Specifically, Smith contends that the prosecutor's reading of the poem entitled "My Name is Meth" to the jury during voir dire inflamed the passions of the jury and that the prosecutor "impermissibly used the methamphetamine poem to improperly condition the jury concerning the evils of methamphetamine." Appellant's Br. p. 17.

Notwithstanding Smith's contention, we note that he failed to properly object to the prosecutor's comments at trial. Moreover, Smith did not request an admonishment or move for a mistrial. Therefore, the issue is waived. Cowan v. State, 783 N.E.2d 1270, 1277 (Ind. Ct. App. 2003) (holding that to preserve a claim of prosecutorial misconduct, a defendant must not only object to the alleged misconduct but must also request an admonishment and move for a mistrial).

III. Sufficiency of the Evidence

Smith contends that the evidence was insufficient to support his conviction. Specifically, Smith maintains that the conviction must be set aside because Callaway was an "unbelievable witness" who received a "lenient plea deal" in exchange for his cooperation with the State. Appellant's Br. p. 6.

We initially observe that when reviewing a challenge to the sufficiency of the evidence, we do not reweigh the evidence or assess the credibility of witnesses.

McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005). Moreover, we consider only the evidence favorable to the verdict and all reasonable inferences therefrom. Id. The uncorroborated testimony of a single witness is sufficient to support a conviction. Thompson v. State, 612 N.E.2d 1094, 1098 (Ind. Ct. App. 1993). Moreover, it is the jury's responsibility to decide who to believe or disbelieve. Cohen, 714 N.E.2d at 1179. The only time that we will invade the jury's province to weigh evidence and judge witness credibility is in the "rare case" where the testimony is so inherently incredible or improbable that it "runs counter to human experience" and "no reasonable person could believe it." Edwards v. State, 753 N.E.2d 618, 622 (Ind. 2001). Application of this "incredible dubiousity" rule is "limited to cases where a sole witness presents inherently contradictory testimony which is equivocal or the result of coercion and there is a complete lack of circumstantial evidence of the defendant's guilt." Majors v. State, 748 N.E.2d 365, 367 (Ind. 2001). We will affirm the conviction unless "no rational factfinder" could have found the defendant guilty beyond a reasonable doubt. Clark v. State, 728 N.E.2d 880, 887 (Ind. Ct. App. 2000).

In this case, the charging information read in pertinent part as follows:

On or about November 18, 2006, in Dearborn County, State of Indiana, Justin M. Callaway, Robert H. Gregory Jr. and Ronnie C. Smith did agree with each other and/or other persons to commit the felony of Manufacturing Methamphetamine, and in so doing, Robert H. Gregory Jr. did knowingly perform an overt act in furtherance of said agreement, to-wit: did manufacture methamphetamine.

Appellant's App. p. 13. In accordance with the above, to convict Smith of the charged offense, the State was required to prove that: 1) with the intent to manufacture

methamphetamine; 2) he agreed with Callaway and Gregory to manufacture methamphetamine; and 3) Gregory performed an overt act in furtherance of this agreement by manufacturing methamphetamine. I.C. § 35-41-5-2; I.C. § 35-48-4-1.1.

In this case, Callaway testified that he, Smith, and Gregory agreed to manufacture methamphetamine, and that the three began to produce the drug on November 18, 2006. Tr. p. 587-89. More specifically, Callaway testified that Smith and Gregory arrived at his mother's house and unloaded a number of items used in the manufacture of methamphetamine from Gregory's truck including pills, ammonium nitrate, drain clog remover, and a propane tank. Id. at 590-95. Callaway further testified that he observed Gregory and Smith mixing the ammonium nitrate and drain clog remover. Id. at 606.

The State presented additional evidence that combining ammonium nitrate with drain clog remover and water produces anhydrous ammonia, which is a necessary ingredient for the manufacture of methamphetamine. Id. at 377, 463-64, 523-28. It was also established that numerous items discovered in the barn are used in the production of methamphetamine. Moreover, methamphetamine was found in a bucket inside the barn. Id. at 366, 370-91, 444-45, 452, 465-77, 507-08, 512, 523-28, 535-36, 542-47, 567-70, 719-23.

We also note that, contrary to Smith's claim, the incredible dubiousity rule does not apply here because Callaway's testimony was not inherently contradictory or equivocal, and this case is not completely devoid of circumstantial evidence. Indeed, our review of the record reveals that Callaway's testimony was consistent and unequivocal, in that he testified that Smith agreed to manufacture methamphetamine and was an active

participant in the methamphetamine manufacturing operation. Although Smith attempted to impeach Callaway's credibility by pointing to minor inconsistencies that existed between the pretrial statements and his trial testimony, those inconsistencies do not render the incredible dubiousity rule applicable. See Newsome v. State, 686 N.E.2d 868, 875 (Ind. Ct. App. 1997) (observing that the incredible dubiousity rule applies only to internal inconsistencies within the witness's trial testimony and does not apply to inconsistencies between the trial testimony and pre-trial or extra-trial statements made by the witness). Moreover, the police recovered extensive evidence showing that methamphetamine manufacturing was occurring, including the many items used in the manufacturing process, evidence establishing that anhydrous ammonia had been manufactured, and the presence of methamphetamine in the barn. Because that circumstantial evidence corroborated Callaway's testimony, the incredible dubiousity rule is also inapplicable on this basis. Jacobs v. State, 802 N.E.2d 995, 998 (Ind. Ct. App. 2004).

Finally, it is apparent that the jury was fully informed of the fact that Callaway had received a beneficial plea agreement. That said, all of Smith's arguments about why Callaway should not be believed amount to an invitation that we reweigh the evidence and judge Callaway's credibility—an invitation that we decline. When considering the above, it is apparent that the State presented evidence to support all the elements of the crime charged, in that Smith agreed to manufacture methamphetamine and Gregory committed the overt act of manufacturing that drug with Smith and Callaway's

assistance. Thus, we conclude that the evidence was sufficient to support Smith's conviction.

IV. Sentencing

Finally, Smith argues that the twenty-year sentence² is inappropriate in light of the nature of the offense and his character. Pursuant to Indiana Appellate Rule 7(B), our court has the constitutional authority to revise a sentence if, after due consideration of the trial court's decision, we find that the sentence is "inappropriate in light of the nature of the offense and the character of the offender." We defer to the trial court during appropriateness review, Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007), and the burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

As for the nature of the offense, the evidence established that Smith and two others conspired to manufacture methamphetamine. Moreover, the conspiracy was carried out and brought to fruition. The production occurred at a residence where other individuals were present, and the method of methamphetamine manufacturing in which Smith and the others engaged also involved the dangerous production of anhydrous ammonia. In short, we do not find the nature of the offense to aid Smith's inappropriateness argument.

² Pursuant to Indiana Code section 35-50-2-5, "A person who commits a Class B felony shall be imprisoned for a fixed term of between six (6) and twenty (20) years, with the advisory sentence being ten (10) years."

Turning to Smith's character, the evidence established that he has accumulated six prior convictions, demonstrating his unwillingness to abide by the law and his failure to learn from those experiences. Most significantly, Smith has a prior conviction for class A felony dealing in cocaine. Indeed, that offense is similar in nature and gravity to Smith's current conviction for conspiracy to deal in methamphetamine. After receiving a serious felony conviction and a significant prison sentence, Smith again engaged in almost the same conduct that involved a different illegal substance. As the trial court observed, such a pattern of conduct demonstrates a high likelihood that Smith will engage in future drug crimes and demonstrates that he poses a danger to the community. Indeed, it is apparent that Smith's behavior has worsened, as he is now involved in the dangerous process of manufacturing methamphetamine, which poses a risk to all those who live in the area or who are present in the manufacturing location due to the explosive and toxic chemicals involved.

Finally, we note that Smith's attempt to compare his sentence to those that his co-conspirators received is unpersuasive and irrelevant. For instance, Callaway pleaded guilty and cooperated with the investigators. Thus, it is not surprising that he would have received a lesser sentence than did Smith. Moreover, there is nothing in the record establishing that Callaway has any prior convictions, much less a prior conviction for dealing or manufacturing drugs. This also renders it appropriate for Smith to receive a greater sentence than Callaway.

We also note that there is nothing in the record establishing whether Gregory's criminal record was as significant as Smith's or what other information regarding

Gregory's character was before the trial court. Nor should it, as the relevant consideration is not whether Smith should receive the same sentence as Gregory. Rather, as indicated above, the relevant consideration is whether Smith's sentence is appropriate in light of what he did and what the record shows about his character. In sum, after analyzing the nature of the offense and Smith's character, we do not find the twenty-year sentence inappropriate.

The judgment of the trial court is affirmed.

RILEY, J., and ROBB, J., concur.